Supreme Court, U.S.
FILED

93 1679 APR 25 1994

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NICHOLAS DePENTO
Attorney at Law
1202 Kettner Boulevard
Suite 4100
San Diego, CA 92101
(619) 236-1151

Attorney for Petitioner

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Sentencing Commission exceeded its jurisdictional authority in designating conspiracy to commit a narcotics offense as a predicate for application of the "career offender" guideline.

2. Whether the Appellate Court erred in validating the trial court's refusal of petitioner's trial continuance motion.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI . . .	1
I. PARTIES TO THE ACTION BELOW . .	2
II. OPINIONS BELOW	2
III. JURISDICTION	3
IV. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED .	4
V. STATEMENT OF THE CASE	10
VI. REASONS FOR GRANTING THE WRIT .	21
A. The Sentencing Issue Presented Herein Requires this Honorable Court's Prompt Resolution.	21
B. The Continuance Issue Raises New Questions Concerning the Parameters of the Constitutional Right to Adequately Prepared Counsel.	23
VII. CONCLUSION	26
PROOF OF SERVICE	27

TABLE OF AUTHORITIES

Page

Cases:

Lockhart v. Fretwell,
113 S. Ct. 838 (1993) 23

United States v. Price,
990 F.2d 1367 (D.C. Cir. 1993) . 14

United States v. Spencer,
817 F.Supp. 176 (D.C. Cir. 1993) 16

Constitutional Provisions:

U.S. Constitution, Amendment VI 4

Statutes:

28 U.S.C. § 994(a)(2) 4, 16

28 U.S.C. § 994(h) 5, 15

28 U.S.C. § 1254(1) 3

Sentencing Guidelines:

Guideline 4B1.1 8

Guideline 4B1.2,
Application Note 1 9

Guideline 4B1.2(2) 9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Steven Robert Britenbach, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 24 January 1994.

I.

PARTIES TO THE ACTION BELOW

The parties to the action in the Court of Appeals were petitioner, co-defendants Wayne Rodney Heim, Dyan Jones, and Dwayne Keith Fitzen, and respondent United States of America.

II.

OPINIONS BELOW

On January 24, 1994, the Court of Appeals entered two opinions in petitioner's case. The first opinion, which was ordered published, confined itself to petitioner's contention that he was improperly sentenced as a career offender and ultimately upheld the sentence imposed based upon that classification. The second, unpublished, opinion dealt with the balance of petitioner's contentions as to the validity of the convic-

tions themselves, including petitioner's contention that he was deprived of adequate counsel at trial by virtue of the trial court's refusal to grant counsel a reasonable continuance to prepare the case. The Court of Appeals upheld petitioner's convictions in all respects. The published opinion, and that portion of the unpublished opinion dealing with the continuance issue, are attached hereto as Appendix A.

III.

JURISDICTION

On January 24, 1994, the Court of Appeals entered its dual opinion sustaining petitioner's convictions after trial and the career offender sentence imposed. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

IV.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Title 28, United States Code, Section 994(a)(2):

> (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate

and distribute to all courts of the United States and to the United States Probation System --

. . . .

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code. . . .

Title 28, United States Code, Section 994(h):

(h) The Commission shall assure that the guidelines

specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and --

(1) has been convicted of a felony that is --

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a),

955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(2) has previously been convicted of two or more prior felonies, each of which is --

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a),

955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

Federal Sentencing Guideline No. 4B1.1:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. . . .

Federal Sentencing Guideline No. 4B1.2(2):

> The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacturing, import, export, distribution of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 to Guideline 4B1.2:

> The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiracy and attempting to commit such offenses.

V.

STATEMENT OF THE CASE

On February 13, 1992, a multi-count indictment was filed in the United States District Court for the District of Idaho charging petitioner's co-defendants Fitzen and Heim with a narcotics distribution conspiracy and various ITAR and telephone counts related to that conspiracy (Clerk's Record, hereafter "C.R.", 1). Counsel for said co-defendants were appointed on February 25, 1992 (C.R. 3, 7). On March 13, 1992, a superseding indictment was filed, naming additional co-defendants (not petitioner Britenbach) in the alleged narcotics conspiracy (C.R. 18). A second superseding indictment was filed on May 14, 1992, which added petitioner herein as a named defendant for the first time (C.R. 128). Petitioner

was arrested on the warrant generated by said superseding indictment on May 27, 1992 (C.R. 139).

Petitioner was not arraigned on the second superseding indictment which named him until June 19, 1992 (C.R. 148). Trial on said superseding indictment was set for August 11, 1992 (C.R. 148). Petitioner's trial counsel, J. Michael Wheiler, Esq., was not formally appointed until July 2, 1992, 40 days before the trial commenced (C.R. 155).

A third superseding indictment was filed on July 15, 1992, which pleading enlarged the alleged time frame for the claimed narcotics conspiracy (Appellant's Excerpt of Record, hereafter "AER", 1). On July 16, 1992, petitioner's counsel filed a motion for continuance of the trial date (AER 12). Petitioner was

arraigned on the third superseding indictment on July 20, 1992 (C.R. 176). Petitioner's motion for continuance of the trial date was denied by order of the District Court on July 28, 1992 (AER 15). On August 3, 1992, petitioner's trial counsel filed a motion to reconsider the denial of a continuance (AER 29). On August 11, 1992, the trial herein commenced after petitioner's counsel renewed his motion for continuance, which request was denied (Reporter's Transcript, hereafter "R.T.", 1-28).

The jury trial herein concluded on August 28, 1992, with the jury finding petitioner Britenbach guilty as to the conspiracy count and substantive ITAR and telephone use counts alleged against him. Petitioner was sentenced on November 23, 1992, to a thirty-year term as to Count 1

(conspiracy), with a five-year term as to each of the other counts, to run concurrently with each other and with the thirty-year term imposed on Count 1.

On December 1, 1992, petitioner filed his timely Notice of Appeal from the November 23, 1992, judgment and sentence committing him to the custody of the Attorney General for thirty-five years.

Petitioner contended on appeal that the denial of the requested trial continuance was an abuse of discretion violating his right to adequately prepared counsel and raised other substantive matters not relevant to the instant petition.

Shortly before oral argument on the appeal, counsel for petitioner discovered the case of United States v. Price,

990 F.2d 1367 (D.C. Cir. 1993), which held that a conspiracy conviction was not a valid or lawful predicate for application of the career offender sentence guideline. By letter, counsel informed the Appellate Court of the existence of the Price case and noted that, although the Price issue had not been raised in filed briefs, the opinion did raise serious questions regarding the legality of petitioner's sentence. At the oral argument on the appeal, the court requested that counsel submit supplemental briefs on the Price issue, and that aspect of the case was submitted to the court on said supplemental briefs without oral argument.

Respecting the specific sentencing question, which is the central and most important issue herein, the record below

discloses that petitioner was sentenced as a career offender on the specific ground that he was convicted of a conspiracy to distribute narcotics and had suffered two prior narcotics convictions, one of which was itself a conspiracy offense. The Price case, upon which petitioner relied, unequivocally held that a conspiracy conviction is not a valid predicate for career offender treatment because "conspiracy" was not an enumerated offense in the legislation which authorized the Sentencing Commission to create a "career offender" classification (28 U.S.C. § 994(h)). Moreover, the Price court concluded that the Sentencing Commission, as an administrative agency, is not entitled to the measure of judicial "due deference" afforded to legislative bodies, particu-

larly when its decisions or pronouncements conflict with express statutory language. This thesis has been accepted as controlling in United States v. Spencer, 817 F.Supp. 176 (D.C. Cir. 1993).

The Ninth Circuit, in its published opinion in petitioner's case, expressly rejected the Price rationale and ruled that the Sentencing Commission's inclusion of conspiracy as a predicate to "career offender" status was a lawful exercise of authority. In so holding, the Ninth Circuit opined that the Commission was "implementing the mandate" of Section 994(h) and further held that the Commission could validly expand the list of predicate offenses under the general "policy statement" authority conferred by 28 U.S.C. Section 994(a)(2).

As a secondary, but fundamental, issue herein, petitioner contends that he was deprived of adequately prepared counsel at his trial, due to the erroneous and arbitrary denial of a continuance motion made by trial counsel. As noted previously, petitioner's trial counsel was officially appointed only 40 days before trial, upon an indictment alleging 35 counts linked under the overall allegations of a single narcotics conspiracy. The final, amended version of the indictment was filed only 27 days before trial. The trial itself generated 1960 pages of testimony by 28 witnesses and 186 exhibits placed into evidence by the government.

On July 16, 1992, one day after the final amended indictment was filed, petitioner's trial counsel filed a

continuance motion, asserting that he could not adequately prepare the case due to voluminous discovery materials and the existence of numerous witnesses. Said motion was denied by order of the court on July 28, 1992, which held that defense counsel "voluntarily undertook this appointment with full knowledge of the impending trial," that because the government had worked with co-defendants' counsel for several prior months it "was in a better position to prepare and provide discovery material," that "the government contends the evidence to be used against Britenbach comes primarily from Britenbach's own statements," and thus the difficulty of preparation was not so great as to require a continuance (AER 16-17). Counsel moved twice more for reconsideration of this order, by

motion on August 3, 1992, and on the morning of trial. Counsel stressed that the government did not oppose a continuance if it was made applicable to all defendants and noted that the case against defendant would encompass much testimony and evidence other than the purported statements of defendant himself. In response, the prosecution again stated that "95 percent of the information the jury will rely on to convict Mr. Britenbach comes out of his own mouth . . . and has very little to do with confidential informants, or anything else." (R.T. I, 12.) The renewed motions for continuance were likewise denied.

On appeal, petitioner noted that the prosecutorial characterization of the evidence against Mr. Britenbach was false

in that the vast bulk of the evidence presented was in fact the testimony of informants. In its pleadings before the Court of Appeals, the prosecution never denied the falsity of its assertions to the trial court.

The Court of Appeals held that the trial court cited "sufficient legitimate reasons" to deny a continuance and that petitioner had failed to demonstrate prejudice to his defense, despite the fact that trial counsel himself had forthrightly advised the trial court that he was not comfortable "with my understanding and my ability to comprehend all of the information that has been given to me" (R.T. I, 2) and despite petitioner's showing of the introduction of at least five critical and incriminating hearsay statements by informant witnesses which

were not objected to by counsel because he did not grasp the scope of the conspiracy alleged.

VI.

REASONS FOR GRANTING THE WRIT

A. The Sentencing Issue Presented Herein Requires this Honorable Court's Prompt Resolution.

Petitioner's case comes before this Honorable Court as a clear example of a split of published authority on an issue of critical importance to the administration of justice in the federal criminal court system. The question at stake is facially quite simple, i.e., whether or not the federal Sentencing Commission may validly expand the list of offenses which will trigger career offender status for sentencing purposes. But underlying this question is a deeper and more fundamental

inquiry, that is, the extent to which the pronouncements of the Sentencing Commission are to be afforded the same aura of "due deference" which is applied to the enactments of legislative bodies. This question lies at the heart of the split in opinion between the District of Columbia and the Ninth Circuit courts of appeal. Resolution of such appellate level divergencies of opinion constitute a central aspect of this Honorable Court's historical mandate. It cannot be disputed that the issue itself entails some measure of urgency in its resolution for the sake of defendants across the nation who face the prospect of possible application of a harsh "career offender" sentence and the district courts which are called upon to apply that guideline.

B. **The Continuance Issue Raises New Questions Concerning the Parameters of the Constitutional Right to Adequately Prepared Counsel.**

The denial of petitioner's requests for trial continuance below were based at bottom on the holding that petitioner's trial counsel had "volunteered" to accept an inadequate period of trial preparation by accepting his appointment as petitioner's counsel and the false assertions of the prosecution concerning the character of the evidence which would be proffered against petitioner. As recently as 1993, in Lockhart v. Fretwell, 113 S. Ct. 838 (1993), this Honorable Court reiterated the established principle that the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial, and that the right to the

effective assistance of counsel is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial. The instant case presents two unique forms of assault on the right to counsel which merit this Court's express condemnation. First, the trial court's continuance denial was based in part on the proposition that when an attorney accepts appointment as a defense counsel he takes the case as he finds it and impliedly waives any right to a reasonable continuance in order to adequately prepare for trial. The Ninth Circuit validated this holding as a "legitimate reason" for the denial of a continuance. If that logic is permissible, appointed counsel across the nation should be so informed so that they may intelligently decide whether to

accept an appointment which might carry with it an implied waiver of adequate preparation time.

Second, the trial court's continuance ruling was tainted by the government's false assertions regarding the nature of the case and its evidentiary underpinnings. The Ninth Circuit wholly ignored this aspect of the issue in its ruling, thereby implying that this governmental conduct was irrelevant or de minimis in importance to the right to adequate counsel. It is inconceivable that such conduct can be condoned when it demonstrably results in a performance of defense counsel who did not comprehend the nature and scope of the conspiracy allegation he was called upon to defend against. Counsel for petitioner therefore urges the adoption of a rule which

creates a per se finding of Sixth Amendment violation when the government opposes a continuance of trial by misleading the court (and defense counsel) as to the nature of the evidence to be presented.

VII.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Date: 9-22-94 Respectfully submitted

NICHOLAS DePENTO
Attorney at Law
1202 Kettner Boulevard
Suite 4100
San Diego, CA 92101

Attorney for Petitioner

APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WAYNE RODNEY HEIM; DYAN JONES; STEVEN ROBERT BRITTENBACH; DWAYNE KEITH FITZEN, *Defendants-Appellants.*	Nos. 93-30090 93-30091 93-30092 93-30101 D.C. No. CR-92-021-EJL OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued, Submission Deferred November 1, 1993
Submitted November 15, 1993
Seattle, Washington

Filed January 24, 1994

Before: Thomas Tang, Jerome Farris and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Criminal Law and Procedure/Sentencing/Conspiracy

The court of appeals affirmed a district court judgment of sentence. The court held that the Sentencing Commission did not exceed its authority by including conspiracy within the

definition of "controlled substance offense" in career offender Guidelines.

Appellant Steven Britenbach was convicted of conspiracy to distribute controlled substances. The district court sentenced him as a career offender under Sentencing Guidelines § 4B1.1, which provides requirements for a defendant to be a career offender. One such requirement is that the instant offense of conviction be a felony that is either a crime of violence or a controlled substance offense. The commentary to § 4B1.2 states that the term "controlled substance offense" includes the offense of conspiring to commit a controlled substance offense.

Britenbach appealed his sentence, contending, among other things, that the Sentencing Commission exceeded its statutory authority by including conspiracy within the definition of a "controlled substance offense."

[1] The Commission properly included conspiracy within the definition of "controlled substance offense." [2] In deciding to include conspiracy within the definition for purposes of determining the offense level of career offenders, the Commission was lawfully exercising its authority under 28 U.S.C. § 994(a)(2). Nowhere in the commentary to § 4B1.1 did the Commission suggest that it considered § 994(h) to be the sole legal authority for promulgating the career offender Guidelines.

COUNSEL

Monte R. Whittier, Whittier, McDougall, Souza, Murray & Clark, Pocatello, Idaho, for defendant-appellant Dwayne Keith Fitzen.

Steven V. Richert, Green, Service, Gasser & Kerl, Pocatello, Idaho, for defendant-appellant Wayne Rodney Heim.

Nicholas DePento, San Diego, California, for defendant-appellant Steven R. Britenbach.

Kelly Kumm, Jones, Chartered, Pocatello, Idaho, for defendant-appellant Dyan Jones.

Monte J. Stiles, Assistant United States Attorney, Boise, Idaho, for the plaintiff-appellee.

OPINION

FARRIS, Circuit Judge:

Wayne Rodney Heim, Dwayne Keith Fitzen, Dyan Jones and Steven R. Britenbach appeal their convictions for conspiracy to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. Britenbach also appeals his convictions on six counts of violating the Travel Act, 18 U.S.C. § 1952. All four defendants appeal their sentences. We have jurisdiction over their appeals pursuant to 28 U.S.C. § 1291. The convictions of all four co-defendants and the sentences of Heim, Fitzen and Jones are affirmed in a separate unpublished disposition. In this opinion, we affirm Britenbach's sentence.

I. FACTS

The evidence at trial established that defendants Heim, Fitzen, Jones and Britenbach conspired to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. During the course of the conspiracy, Fitzen, Heim and Jones resided in Pocatello, Idaho while Britenbach operated in Southern California. Britenbach and, to a lesser extent, co-defendant Mike Luce (who pleaded guilty) supplied cocaine and marijuana to the Pocatello co-conspirators.

The district court sentenced Britenbach as a career offender under § 4B1.1 of the United States Sentencing Guidelines.

Section 4B1.1 provides that a defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. The commentary to § 4B1.2 states that the term "controlled substance offense" includes the offense of conspiring to commit a controlled substance offense. U.S.S.G. § 4B1.2 comment. (n.1).

In finding that Britenbach was a career offender, the district court relied on two prior controlled substance felony convictions (a 1975 conviction for importation of controlled substances and a 1985 conviction for possession of narcotics with the intent to distribute) and the instant conspiracy conviction.

II. Use of Conspiracy Conviction Toward Career Offender Status

[1] Britenbach argues that the United States Sentencing Commission exceeded its statutory authority by including conspiracy within the definition of a "controlled substance offense." He relies on *United States v. Price*, 990 F.2d 1367 (D.C.Cir. 1993) for this proposition. We reject his argument. The Sentencing Commission properly included conspiracy within the definition of "controlled substance offense."[1]

[1]Other Circuits have accepted the inclusion of conspiracy as a predicate offense under the career offender guidelines. *See United States v. Flore*, 983 F.2d 1 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1830 (1993); *United States v. Whitaker*, 938 F.2d 1551 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 977 (1992); *United States v. Jones*, 898 F.2d 1461 (10th Cir.), *cert. denied*, 498 U.S. 838 (1990).

We review the legality of a sentence de novo. *United States v. Fine*, 975 F.2d 596, 599 (9th Cir. 1992) (en banc). The commentary to § 4B1.1 explains that "28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined in the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate." U.S.S.G. § 4B1.1, comment. (backg'd). The pertinent language in § 994(h) provides that

> [t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and . . . has been convicted of a felony that is . . . a crime of violence[,] or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. § 841) . . . and . . . has previously been convicted of two or more prior felonies, each of which is . . . a crime of violence[,] . . . or an offense described in section 401 of the Controlled Substances Act . . . .

28 U.S.C. § 994(h). Section 401 of the Controlled Substances Act prohibits substantive controlled substance offenses, but makes no mention of conspiracy. 21 U.S.C. § 841. In *Price*, the court reasoned that "[a] conspiracy to commit a crime involves quite different elements from whatever substantive crime the defendants conspire to commit" and therefore conspiracy to violate the Controlled Substances Act "cannot be said to be one of the offenses 'described in' " § 401 of the Act. *Price*, 990 F.2d at 1369. The court held that because the Commission had relied on § 994(h) as the enabling statute for adopting §§ 4B1.1 and 4B1.2, the Commission had offered a "legally invalid" reason for including conspiracy within the definition of "controlled substance offense." *Id.* at 1370.

[2] The commentary to § 4B1.1 should be read less restrictively. It indicates that the career offender guidelines were intended to "implement[ ] the mandate" of § 994(h). The language means what it says—the Commission intended to implement the mandate of § 994(h). Nowhere in the commentary to § 4B1.1 does the Commission suggest that it considered § 994(h) to be the sole legal authority for promulgating the career offender guidelines. *Cf. United States v. Parson*, 955 F.2d 858, 866-67 (3d Cir. 1992) (holding that definition of "crime of violence" in career offender guidelines is not restricted to definition contained in § 994(h)). Elsewhere in the Guidelines, the Commission has explained that "[t]he guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code." U.S.S.G., Ch. 1, Part A, § 1. Section 994(a)(2) provides that the Commission shall promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code . . . ." 28 U.S.C. § 994(a)(2). Therefore, in deciding to include conspiracy within the definition of "controlled substance offense" for purposes of determining the offense level of career offenders, the Commission was lawfully exercising its authority under § 994(a)(2).[2]

The Commission's decision to go beyond the mandate of § 994(h) is also consistent with the legislative history to § 994(h). The Senate Report made clear that § 994(h) was not intended as a ceiling for establishing career offender guidelines: "[Section 994(h) is] not necessarily intended to be an

[2]The *Price* court noted that the Commission "may well be free" to include conspiracy within the definition of controlled substance offense pursuant to the Commission's broad mandate in 28 U.S.C. § 994(a). *Price*, 990 F.2d at 1369. However, there is no indication that the *Price* court considered the Commission's explanation that the Guidelines were, in fact, promulgated pursuant to the Commission's general authority in § 994(a).

exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified." S.Rep. No. 98-225, 98th Cong., 1st Sess. 307 (1983), in 1984 U.S.C.C.A.N. 3182, 3359.

We hold that the Sentencing Commission did not exceed its statutory authority in including conspiracy within the definition of "controlled substance offense" in §§ 4B1.1 and 4B1.2.

III. Inclusion of Britenbach's 1975 Offense

Britenbach also asserts that the district court erred in counting the earlier of his two prior felony convictions (the 1975 conviction for importation of cocaine) toward career offender status.

The district court's application of the Sentencing Guidelines is reviewed de novo. *United States v. Fagan*, 996 F.2d 1009, 1017 (9th Cir. 1993). Factual findings in the sentencing phase are reviewed for clear error. *United States v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992).

Prior felony convictions can count toward career offender status if they resulted in a prison sentence in excess of one year and one month and if the defendant was incarcerated for that sentence during the 15 year period preceding defendant's involvement in the instant offense. *See* U.S.S.G. §§ 4B1.2 comment. (n.4), 4A1.2(e)(1).

Britenbach was arrested in New York for importation of controlled substances in 1975. While he was released on bond for that arrest, he was arrested in Mexico on drug charges. He was incarcerated in Mexico until 1978 when he was returned to New York on a prisoner exchange. The New York charges were then resolved by crediting him for time served in Mexico and requiring him to serve the balance of his term in a New York prison until 1980. Britenbach argues that he should

not have been attributed career offender status because he was unable to resolve the charges from his New York arrest in 1975 (potentially over 15 years before his involvement in the instant conspiracy).

Britenbach's argument lacks merit. Under the Guidelines, a conviction for which a defendant is serving a sentence during the applicable 15 year period counts toward career offender status. The ultimate resolution of the New York charges resulted in Britenbach's serving time in New York from 1978-1980 *and* he was given credit for time served in Mexico. The district court made the factual finding that Britenbach first became involved in the instant conspiracy in January 1991 (11 years after his 1980 release date). Britenbach would have been within the fifteen year statutory range even if he had only served a one year sentence in New York beginning in 1975. The district court properly included the 1975 controlled substance offense as a "prior felony" conviction under § 4B1.1.

IV. The District Court's Failure to Depart Downward

Britenbach argues that the district court failed to realize that it had the authority to depart downward based on his age and medical condition. The record fails to suggest that the district court was under the impression that it could not depart downward if it chose to do so. A district court's discretionary refusal to depart from the Sentencing Guidelines is not reviewable on appeal. *United States v. Morales*, 972 F.2d 1007, 1011 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1665 (1993).

AFFIRMED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	CA No. 93-30090
	CA No. 93-30091
	CA No. 93-30092
Plaintiff-Appellee,	CA No. 93-30101
v.	DC No. CR-92-021-EJL
WAYNE RODNEY HEIM	
DYAN JONES	
STEVEN ROBERT BRITENBACH	MEMORANDUM*
DWAYNE KEITH FITZEN	
Defendants-Appellants.	

FILED

JAN 24 1994

CINDY A. CATHCART, CLERK
U.S. COURT OF APPEALS

Appeal from the United States
District Court for the
District of Idaho
Edward J. Lodge, District
Judge, Presiding

Argued and Submission
Submitted November 15, 1993
Seattle, Washington

Before: TANG, FARRIS and RYMER, Circuit Judges

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

Defendants Wayne Rodney Heim, Dwayne Keith Fitzen, Steven R. Britenbach and Dyan Jones appeal their convictions for conspiracy to distribute controlled substances in violation of 18 U.S.C. §§ 841(a)(1) and 846. Defendant Britenbach also appeals his convictions under 18 U.S.C. § 1952 on six counts of interstate travel and telephone use in furtherance of racketeering. All four defendants appeal their sentences. In addition, Britenbach appeals the district court's denial of his motion for a continuance. Jones also appeals the district court's denial of her motion for severance. Finally, Heim alleges a due process violation. We have jurisdiction over their timely appeals pursuant to 28 U.S.C. § 1291. We affirm the convic-

tions of all four defendants and the sentences of Heim, Fitzen and Jones. We also affirm the denial of Britenbach and Jones' motions and find no merit in Heim's due process argument. Britenbach's appeal of his sentence is addressed in a separate published opinion.

I. Denial of Britenbach's Motion to Continue

Britenbach argues that the district court erred in denying his motion to continue the trial because his trial counsel was appointed only forty days before trial. He also contends that the district court improperly relied on the fact that his trial counsel had voluntarily accepted appointment to the case. Britenbach relies upon numerous examples of hearsay that was admitted

against him without objection to demonstrate that he was prejudiced by the denial of his motion for continuance.

We review the denial of a motion to continue for abuse of discretion. United States v. Robinson, 967 F.2d 287, 291 (9th Cir. 1992). In determining whether a denial was fair and reasonable, we consider "whether the continuance would inconvenience witnesses, the court, counsel, or the parties; whether other continuances have been granted; whether legitimate reasons exist for the delay; whether the delay is the defendant's fault; and whether a denial would prejudice the defendant." Robinson, 967 F.2d at 291. Before a district court's denial of a continuance will be reversed, "the appellant must establish that the refusal resulted in prejudice to

his defense." United States v. Long, 706 F.2d 1044, 1053 (9th Cir. 1983).

We have reviewed the record. Although the district court did mention that Britenbach's trial counsel "voluntarily undertook the appointment," it also carefully considered the difficulty of preparation for a case of this nature and concluded that forty days was sufficient time. In denying a motion to reconsider, the district court also considered the effect of delay on judicial economy. There were sufficient legitimate reasons to justify the denial of Britenbach's motion.

Further, Britenbach's attempt to demonstrate prejudice fails. His claim of hearsay statements included co-conspirator statements that were narrative declarations, not made in

furtherance of the conspiracy. Nothing in the record suggests that longer pre-trial preparation would better enable a trial attorney to distinguish between a "mere narration" and a statement made in furtherance of a conspiracy.

* * * *

Supreme Court, U.S.
FILED
JUN 24 1994
OFFICE OF THE CLERK

No. 93-1679

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEVEN ROBERT BRITENBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JO ANN HARRIS
Assistant Attorney General
CYNTHIA A. YOUNG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner should be sentenced as a career offender under Sentencing Guidelines § 4B1.1 when he was convicted of conspiring to distribute controlled substances and had previously been convicted on two drug trafficking felonies.

2. Whether the district court abused its discretion in denying petitioner's motion for a continuance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 500 U.S. 344 (1991)	11, 12
Mistretta v. *United States*, 488 U.S. 361 (1989)	8
Morris v. *Slappy*, 461 U.S. 1 (1983)	12
Stinson v. *United States*, 113 S. Ct. 1913 (1993)	12
Ungar v. *Sarafite*, 376 U.S. 575 (1964)	12
United States v. *Allen*, No. 92-1225 (10th Cir. May 5, 1994)	9, 11
United States v. *Beasley*, 12 F.3d 280 (1st Cir. 1993)	8, 9
United States v. *Clinger*, 681 F.2d 221 (4th Cir.), cert. denied, 459 U.S. 912 (1982)	12
United States v. *Consuegra*, No. 93-3690MN (8th Cir. Apr. 21, 1994)	9
United States v. *Fiore*, 983 F.2d 1 (1st Cir. 1992), cert. denied, 113 S. Ct. 1830 (1993)	9
United States v. *Hightower*, No. 93-5117 (3d Cir. May 31, 1994)	9, 11
United States v. *Jones*, 898 F.2d 1461 (10th Cir.), cert. denied, 498 U.S. 838 (1990)	9
United States v. *Parson*, 955 F.2d 858 (3d Cir. 1992)	9
United States v. *Price*, 990 F.2d 1367 (D.C. Cir. 1993)	9, 10
United States v. *Rivera*, 996 F.2d 993 (9th Cir. 1993)	9
United States v. *Whitaker*, 938 F.2d 1551 (2d Cir. 1991), cert. denied, 112 S. Ct. 977 (1992)	9
United States v. *Whyte*, 892 F.2d 1170 (3d Cir. 1989), cert. denied, 494 U.S. 1070 (1990)	9

Statutes and rules:	Page
18 U.S.C. 1952	2
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2, 8
21 U.S.C. 952(a)	5
21 U.S.C. 952(c)	5
21 U.S.C. 960(a)(1)	5
28 U.S.C. 991(b)(1)(B)	8
28 U.S.C. 994(a)	6, 10
28 U.S.C. 994(f)	8
28 U.S.C. 994(h)	6, 7, 8, 9, 10
28 U.S.C. 994(h)(1)(B)	8, 10
Fed. R. Crim. P. 40	3
Sentencing Guidelines:	
Ch. 1:	
§ 1	10
Ch. 2:	
§ 2D1.1	5
§ 2D1.1, Application Note 1D	6
Ch. 3:	
§ 3B1.1	5
§ 3B1.1(b)	5
Ch. 4:	
§ 4B1.1	4, 5, 6, 7, 10, 11
§ 4B1.1, Background Commentary	6, 7, 10, 11
§ 4B1.2, Application Note 1	5
§ 4B1.2(2)	5
Miscellaneous:	
58 Fed. Reg. (1993):	
p. 67,522	11
p. 67,532	11
59 Fed. Reg. 23,608 (1994)	11
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	9

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1679

STEVEN ROBERT BRITENBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals issued two opinions (Pet. App. 1-8, 9-14).[1] One opinion is reported at 15 F.3d 830; the second is unpublished, but the decision is noted at 15 F.3d 1092 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1994. The petition for a writ of certiorari was filed on April 25, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] For purposes of convenience, the petition appendix has been renumbered consecutively.

STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on one count of conspiring to distribute controlled substances, in violation of 21 U.S.C. 846 and 841(a)(1), and six counts of interstate travel and telephone use in furtherance of racketeering, in violation of 18 U.S.C. 1952. He was sentenced to 360 months' imprisonment, to be followed by ten years of supervised release. He was also ordered to pay a $14,000 fine. C.A. Excerpt of Record 41-45. The court of appeals affirmed. Pet. App. 1-14.

1. Petitioner met co-defendants Dwayne Fitzen and Wayne Heim in 1988 while incarcerated in federal prison in Lompoc, California. Shortly after his parole in September 1989, petitioner provided one kilogram of cocaine on credit to Fitzen and Heim, who had returned from prison to the Pocatello, Idaho, area. Petitioner and his partner Michael Lace subsequently provided Fitzen and Heim with several kilograms of cocaine and large quantities of marijuana. On at least one occasion, petitioner and Lace travelled from southern California to Pocatello to discuss cocaine distribution and the money Heim owed petitioner. Presentence Report 4-10.

In October or November 1991, petitioner and his co-defendants participated in negotiations to supply 20 to 40 kilograms of cocaine per month to an individual in Salt Lake City, Utah. Petitioner, Heim, and the Salt Lake City buyer were in frequent telephone contact during their negotiations in October and November 1991. The plans were eventually abandoned, however, when the buyer reestablished contact with his former source of cocaine. Presentence Report 7-8.

The Pocatello drug trafficking operation began to unravel with the arrests of Heim and Fitzen in late February 1992. Petitioner became concerned that his

role would be discovered and that he would not receive the $22,000 still owed him (and his suppliers) by Heim. By March 1992, petitioner had begun to discuss resumption of the cocaine operation with co-conspirator Mike Wallace. The two men agreed that Wallace would pay more than the market price for each kilogram of cocaine until the $22,000 debt had been repaid. Presentence Report 8-9.

In May 1992, petitioner and Lace told Wallace that their supplier had 100 kilograms of cocaine. They agreed to provide Wallace with eight kilograms of cocaine, and another individual with five. On May 27, 1992, several hours before the transactions were to take place, petitioner and Lace were arrested in Los Angeles County, California. Presentence Report 9-10.

2. On May 14, 1992, petitioner was indicted in the District of Idaho in the second superseding indictment against Heim, Fitzen, and others. Due to a delay in receipt of the Fed. R. Crim. P. 40 papers from California, petitioner's arraignment and appointment of counsel did not occur until June 19, 1992. Trial was scheduled for August 11, 1992. On July 2, 1992, new trial counsel was appointed to represent petitioner. On July 15, 1992, the government returned a third superseding indictment, which extended the end date of the conspiracy from May 14, 1992, to May 27, 1992. Pet. 10-11; Gov't C.A. Br. 41-42; C.A. Excerpt of Record 62.

On July 16, 1992, petitioner moved for a continuance on the ground that his counsel had been appointed only 40 days before trial and thus had inadequate time to prepare. The government stated that it did not object to the request so long as trial for all defendants was continued. The government noted, however, that it had provided petitioner with full discovery and had offered to assist counsel in his preparation for trial. Pet. 11-12; Gov't C.A. Br. 42. The district court denied petitioner's

motion. Noting that the government had produced materials in discovery and that much of the evidence against petitioner was his own statements, the court held that the "difficulty of preparation" for petitioner's case was "not so great that it [could not] be accomplished in the time provided." C.A. Excerpt of Record 16-17.

On August 3, 1992, petitioner moved for reconsideration of the court's order. C.A. Excerpt of Record 29. He renewed his request at the start of trial on August 11, 1992. I Tr. 2. In objecting to the request, the government noted that it had dealt with five different attorneys who purported to represent petitioner, and that the many pre-trial motions filed by petitioner's attorney indicated that counsel was knowledgeable and prepared. I Tr. 11-12. The government attorney also expressed the view that "95 percent of the information the jury will rely on to convict [petitioner] comes out of his own mouth." I Tr. 12. The court again denied the motion, citing the government's open file policy and the "economy" in trying all of the defendants together. Pet. 12; Gov't C.A. Br. 43-44; I Tr. 25-26. Petitioner was convicted following a ten-day trial. Gov't C.A. Br. 2-3.

3. The Presentence Report determined that petitioner fell within Criminal History Category IV. Presentence Report 12-15. The Report recommended, however, that petitioner be sentenced under Guidelines § 4B1.1, which provides that career offenders will be assigned to Criminal History Category VI and will receive enhanced sentences. Under the Guidelines, a defendant is a career offender if

> (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is * * * a controlled substance offense, and (3) the defendant has at least two prior felony convictions of * * * a controlled substance offense.

Guidelines § 4B1.1. The Presentence Report concluded that petitioner's current offense, conspiracy to distribute cocaine and marijuana, was a controlled substance offense,[2] and that petitioner had two prior felony drug trafficking convictions—a 1978 federal felony conviction for importation of cocaine,[3] and a 1986 state felony conviction for possession of cocaine with the intent to sell it. Applying the career offender provision, the Presentence Report assigned petitioner to Criminal History Category VI. Presentence Report 11-15; see Guidelines § 4B1.1.

The Presentence Report calculated petitioner's total offense level under the Sentencing Guidelines to be 39—a base offense level of 36 for petitioner's participation in the distribution of 76 kilograms of cocaine and 210 pounds of marijuana (pursuant to Guidelines § 2D1.1), and a three-level upward adjustment for petitioner's role as a manager and/or supervisor in the criminal enterprise (pursuant to Guidelines § 3B1.1(b)). Presentence Report 11-12. The Report noted that "[petitioner's] adjusted offense level is two points higher than the career offense level [of 37]. Therefore, the career offender offense level does not enhance [petitioner's] adjusted

---

[2] Guidelines § 4B1.2(2) defines a "controlled substance offense" as an offense "under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance * * * or the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." The commentary to Guidelines § 4B1.2 states that this definition includes "the offense[] of * * * conspiring * * * to commit such offenses." Guidelines § 4B1.2, Application Note 1.

[3] The Presentence Report erroneously stated that the 1978 conviction was for conspiracy to import cocaine, in violation of 21 U.S.C. 952(c). Presentence Report 13. The judgment and conviction in that case show that petitioner was convicted of importation, in violation of 21 U.S.C. 952(a) and 960(a)(1), and not of conspiracy. See Gov't C.A. Supp. Br. Attachment A.

offense level." *Id.* at 12; see Guidelines § 2D1.1, Application Note 1D. Using petitioner's total offense level of 39, the Presentence Report calculated petitioner's Guidelines range to be 360 months' to life imprisonment. Presentence Report 19.

4. The district court adopted most of the findings of the Presentence Report, but found that the Report had overstated the amount of cocaine for which petitioner was accountable. The court recalculated petitioner's total offense level to be 37 (based upon 28 kilograms of cocaine). The court then applied the career offender provision and sentenced petitioner to 360 months' imprisonment. The court also ordered petitioner to pay a fine of $14,000. C.A. Excerpt of Record 46-53 (Findings of Fact and Statement of Reasons).

5. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1-14. It first upheld the Sentencing Commission's inclusion of conspiracy within the definition of a "controlled substance offense" for purposes of the career offender provision.[4] *Id.* at 6-7. Although the commentary to Guidelines § 4B1.1 states that the career offender Guideline is intended to implement the mandate of 28 U.S.C. 994(h), the court noted, that commentary does not suggest that Section 994(h) is the sole legal authority for the career offender provisions. Pet. App. 6. Noting that the Guidelines as a whole were promulgated by the Commission pursuant to 28 U.S.C. 994(a), the court held that the Commission had lawfully exercised its authority when it included conspiracy within the definition of "controlled substance offense" for purposes of the career offender provision. Pet. App. 6. The court also cited legislative history in

---

[4] Petitioner raised that issue in a letter to the court of appeals shortly before oral argument. The court then sought supplemental briefing on the issue. See Pet. 13-14.

support of its view that Section 994(h) was not intended to limit the types of cases to which career offender status could apply. Pet. App. 6-7.

In a separate, unpublished opinion, the court of appeals held that the district court had not abused its discretion in denying petitioner's motion for a continuance. Pet. App. 11-14. The court stated that the district court had "sufficient legitimate reasons" to justify the denial of petitioner's motion. *Id.* at 13. Although the district court had "mention[ed]" that defense counsel "voluntarily undertook the appointment," it had also "carefully considered the difficulty of preparation for a case of this nature," as well as the effect of delay on judicial economy, before concluding that 40 days was sufficient to prepare for trial. *Ibid.* The court of appeals also held that petitioner had not demonstrated prejudice from the denial. *Id.* at 13-14.

ARGUMENT

1. Petitioner contends (Pet. 21-22) that conspiracy to distribute controlled substances may not validly be treated as a predicate crime in applying the career offender provision of the Sentencing Guidelines. Although there is a split among the circuits on this issue, petitioner's claim does not warrant further review. The Sentencing Commission has proposed an amendment to the commentary to Guidelines § 4B1.1 that will resolve the dispute.

a. Sentencing Guidelines § 4B1.1 sets forth the conditions for sentencing a defendant as a career offender. The background commentary to Guidelines § 4B1.1 states that the Guideline "implements th[e] mandate" of 28 U.S.C. 994(h). Section 994(h) directs the Sentencing Commission to "assure" that the Guidelines specify a sentence "at or near the maximum term authorized" for a defendant who is at least 18 years old,

> (1) has been convicted of a felony that is
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a) [subsequently transferred to 46 U.S.C. 1901] * * *,

and has previously been convicted of two or more felonies, each of which is a crime of violence or a controlled substance offense as set forth in Subsection (1)(B) above. Conspiracy to distribute controlled substances, see 21 U.S.C. 846, is not among the "offense[s] described in" the drug trafficking statutes enumerated in Section 994(h)(1)(B).

The Sentencing Commission's treatment of conspiracy offenses therefore is not subject to the express directive of 28 U.S.C. 994(h). The Commission acted reasonably, however, in determining that conspiracy to distribute controlled substances should constitute a predicate offense for purposes of the career offender provision. The Commission's approach furthers the substantial federal interest in uniform sentencing, one of the primary objectives of the Guidelines. See *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1989); 28 U.S.C. 991(b)(1)(B), 994(f); see also *United States* v. *Beasley*, 12 F.3d 280, 283 (1st Cir. 1993). Treating drug trafficking conspiracies in the same way as substantive trafficking offenses ensures that repeat offenders who engage in conspiracies incur the same enhanced penalties as those who commit the underlying crimes.

The legislative history confirms that the Commission's treatment of conspiracy offenses was well within its statutory authority. Section 994(h) was

intended "as a floor for the career offender category, not as a ceiling." *United States* v. *Hightower*, No. 93-5117 (3d Cir. May 31, 1994), slip op. 7 (quoting *United States* v. *Parson*, 955 F.2d 858, 867 (3d Cir. 1992)). Section 994(h) was "not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to the authorized maxima should be specified." S. Rep. No. 225, 98th Cong., 1st Sess. 176 (1983). Two courts of appeals in addition to the court below have expressly recognized the Sentencing Commission's authority to include drug conspiracy among the predicate offenses for career offender status. See *United States* v. *Allen*, No. 92-1225 (10th Cir. May 5, 1994), slip op. 14-16; *Hightower*, slip op. 8-10. See also *United States* v. *Fiore*, 983 F.2d 1, 2-4 (1st Cir. 1992) (holding, as a matter of Guideline interpretation, that conspiracy conviction can serve as predicate offense for purposes of career offender provision), cert. denied, 113 S. Ct. 1830 (1993). Cf. *United States* v. *Whitaker*, 938 F.2d 1551, 1552 (2d Cir. 1991) (accepting without comment inclusion of drug conspiracy conviction in career offender Guideline), cert. denied, 112 S. Ct. 977 (1992); *United States* v. *Jones*, 898 F.2d 1461 (10th Cir.), cert. denied, 498 U.S. 838 (1990).[5]

b. Petitioner correctly contends (Pet. 22) that the court of appeals' decision conflicts with *United States* v. *Price*, 990 F.2d 1367 (D.C. Cir. 1993), in which the court vacated a career offender sentence imposed for a drug

---

[5] Similarly, several courts have upheld the Sentencing Commission's authority to include state law convictions under the career offender provision. See, *e.g.*, *United States* v. *Consuegra*, No. 93-3690MN (8th Cir. Apr. 21, 1994); *United States* v. *Beasley*, 12 F.3d 280, 283-284 (1st Cir. 1993); *United States* v. *Rivera*, 996 F.2d 993, 995-996 (9th Cir. 1993); *United States* v. *Whyte*, 892 F.2d 1170, 1174 (3d Cir. 1989), cert. denied, 494 U.S. 1070 (1990).

conspiracy conviction. The court in *Price* noted that the drug trafficking felonies enumerated in 28 U.S.C. 994(h) do not include drug conspiracies. 990 F.2d at 1369. A conspiracy to commit a crime, the court held, "involves quite different elements" from the underlying substantive crime, and thus cannot be said to be an offense "described in" Section 994(h)(1)(B). 990 F.2d at 1369. The court acknowledged that the Sentencing Commission "may well be free under § 994(a) to specify equally long terms for defendants not covered by § 994(h)." *Ibid.* Based upon the background commentary to Guidelines § 4B1.1, however, the court concluded that the Commission's promulgation of the Guideline had been based solely upon 28 U.S.C. 994(h). 990 F.2d at 1369. Because it found the "stated basis" for the Commission's action to be "inadequate for Application Note 1's inclusion of conspiracies," the court held that Price could not be subjected to an enhanced term of imprisonment based on the career offender provision. *Id.* at 1370.

The conflict between *Price* and the decision in this case does not warrant this Court's review. The court in *Price* did not hold that the Commission lacks authority to treat drug conspiracies as predicate crimes for purposes of the career offender provision. Rather, the court held that the Commission had provided a legally invalid explanation of its decision to do so. See 990 F.2d at 1369-1370. That purported defect[6] is fully remediable

---

[6] The holding in *Price* has not been followed in other circuits, and we believe that the decision was incorrect. Although the background commentary to Guidelines § 4B1.1 refers only to the mandate of 28 U.S.C. 994(h), nothing in that commentary suggests that Section 994(h) is the sole legal authority for the career offender provision. The Guidelines as a whole are promulgated pursuant to the Commission's general authority under 28 U.S.C. 994(a). See Sentencing Guidelines Ch. 1, Pt. A, § 1. Other courts

by the Commission itself. On December 21, 1993, the Commission published for comment a proposed amendment to the Sentencing Guidelines that "responds to [the] recent decision * * * in *United States* v. *Price*." See 58 Fed. Reg. 67,522, 67,532 (1993). The proposal would amend the background commentary to Guidelines § 4B1.1 to provide, in pertinent part, that:

> the definition of a career offender [under Guidelines § 4B1.1] track[s] in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct * * *" 28 U.S.C. 991(b)(1)(B). * * *

58 Fed. Reg. 67,532 (1993).[7] In light of that proposal, there is no need for this Court to address the issue. See

---

of appeals have upheld the application of Guidelines § 4B1.1 to conspiracy offenses despite the Commission's failure to cite, in its background commentary, sources of authority in addition to Section 994(h). See *Allen*, slip op. 14-16; *Hightower*, slip op. 8-10.

[7] The proposed amendment was not among those amendments the Commission transmitted to Congress on April 28, 1994. See 59 Fed. Reg. 23,608 (May 5, 1994). Nonetheless, it is the Commission's statutory obligation periodically to review and revise the Sentencing Guidelines in light of the work of the courts. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Amended commentary "is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation" consistent with the Guidelines as a whole and with

Braxton v. *United States*, 500 U.S. 344, 348-349 (1991) (declining to review issue of Guidelines interpretation, in part "because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning" of the Guideline in question).[8]

2. Petitioner renews his contention (Pet. 23-26) that the district court abused its discretion in denying his motion for a continuance. That claim does not warrant further review.

This Court has held that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983) (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)). "The party seeking a continuance generally must show that a delay is necessary for a just determination of the case." *United States* v. *Clinger*, 681 F.2d 221, 223 (4th Cir.), cert. denied, 459 U.S. 912 (1982).

The district court concluded that petitioner's case was not so difficult as to require more than 40 days for preparation by his attorney, particularly in light of the government's open file policy and the fact that most of the documents and other evidence had already been

---

the authorizing statute. *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993).

[8] Petitioner also contends (Pet. 21-22) that this Court's review is necessary to resolve the degree of deference courts should give the Sentencing Commission. In *Stinson*, this Court addressed the question whether the commentary of the Sentencing Guidelines is binding on the federal courts. The Court held that Guidelines commentary that interprets or explains a guideline is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 113 S. Ct. at 1915.

assembled in preparation for the co-defendants' trials. The court also found that judicial economy favored trying all defendants together. Finally, as the court of appeals noted, see Pet. App. 13-14, petitioner failed to demonstrate that he was prejudiced by the denial. Petitioner's challenge to the district court's ruling raises no issue warranting this Court's review.[9]

---

[9] Petitioner contends that the court of appeals endorsed the "proposition that when an attorney accepts appointment as a defense counsel he * * * impliedly waives any right to a reasonable continuance in order to adequately prepare for trial." Pet. 24. The Ninth Circuit merely noted, however, the district court's reference to counsel's voluntary acceptance of the appointment. Its affirmance of the district court's ruling was based on its conclusion that *other* reasons offered by the district court were sufficient to justify the denial of a continuance. See Pet. App. 13.

In opposing petitioner's motion for reconsideration of the denial of a continuance, government counsel stated: "I would suspect that 95 percent of the information the jury will rely on to convict [petitioner] comes out of his own mouth." I Tr. 12. Petitioner claims (Pet. 25-26) that this statement misled the district court. Whatever the exact percentages involved, the record makes clear that much of the evidence against petitioner came from taped conversations. See Gov't C.A. Br. 27-35. The district court did not cite the 95 percent figure, noting only that "the government contends the evidence to be used against [petitioner] comes primarily from [petitioner's] own statements." C.A. Excerpt of Record 17. There is no basis for petitioner's assertion that the district court's ruling was "tainted" (Pet. 25) by the government's characterization of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

JUNE 1994

Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

No. 93-1679

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

NICHOLAS DePENTO
Attorney at Law
1202 Kettner Boulevard
Suite 4100
San Diego, CA 92101
(619) 236-1151

Attorney for Petitioner

10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF TO BRIEF IN OPPOSITION .	1
I. THE INSTANT PETITION MERITS ACCEPTANCE BY THE COURT	1
A. The Sentencing Issue . . .	1
B. The Adequacy of Counsel/ Continuance Issues	11
II. CONCLUSION	12

TABLE OF AUTHORITIES

Page

Cases:

Braxton v. United States,
500 U.S. 344 (1991) 8

Stinson v. United States,
113 S. Ct. 1913 (1993) 10

United States v. Allen,
No. 92-1225 (10th Cir.,
May 5, 1994) 3, 5

United States v. Fiore,
983 F.2d 1 (1st Cir. 1992) 3

United States v. Heim,
15 F.3d 830 (9th Cir. 1994) . . . 5

United States v. Hightower,
No. 93-5117 (3d Cir.,
May 31, 1994) 3, 4

United States v. Price,
990 F.2d 1367 (D.C. Cir. 1993) . . 2

Statutes:

28 U.S.C. Section 994(a) 5, 6

28 U.S.C. Section 994(h) 3, 5

28 U.S.C. Section 994(h)(1)(B) . . 4, 5

Sentencing Guidelines:

Section 4B1.1 . . . . . 5, 7

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-1679

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

I.

THE INSTANT PETITION MERITS ACCEPTANCE BY THE COURT

A. <u>The Sentencing Issue</u>

The United States' Brief in Opposition herein (hereafter designated B.I.O.)

postulates two grounds for the assertion that the instant Petition does not warrant this Court's review. First, it is contended that the holding in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993), the primary case relied upon by Petitioner, ". . . has not been followed in other circuits, and we believe that the decision was incorrect." (B.I.O., page 10, fn. 6.) While Petitioner is cognizant of the fact that the merits of his claim are not before the Court at this stage of the proceedings, it is necessary to address, at least briefly, the contention that Price was erroneously decided, insofar as it may impact upon the Court's decision to grant or withhold certiorari. Of course, the Government's contention that Price was erroneously decided cannot obscure the fact that a

conflict between circuits presently exists on the construction of the career offender guideline. Aside from the published Ninth Circuit opinion in the Petitioner's own case, the Government notes three other cases in its argument that Price is an incorrect statement of the law: United States v. Hightower, No. 93-5117 (3d Cir., May 31, 1994), United States v. Allen, No. 92-1225 (10th Cir., May 5, 1994), and United States v. Fiore, 983 F.2d 1 (1st Cir. 1992). (B.I.O., page 9.) The Fiore opinion is of little utility in the present context, in that the statutory analysis of 28 U.S.C. Section 994(h), as undertaken in Price, formed no part of the decision in Fiore. In contrast, the Hightower opinion expressly declines to follow Price, based upon two disputable

propositions. Hightower asserts that "the problem is that a 'controlled substance offense' is not explicitly defined in Section 994(h)(1)(B)." Hightower, supra, at 1994 W L 226979, page 3. In fact, Section 994(h)(1)(B) does explicitly define controlled substance offenses by reference to specific penal statutes, none of which include the offense of conspiracy. Hightower further states that "if Congress had wanted only convictions under particular federal statutes to serve as predicate offenses, it could have said so quite simply. Instead, Congress referred to 'offenses described in' -- not 'convictions obtained under' -- those statutes." Hightower, supra, at 1994 WL 226979, page 3. Putting aside the dubious semantic distinction between "offense described

in" and "convictions obtained under," it is clear that conspiracy is not an offense "described in" Section 994(h)(1)(B).

The Allen case, supra, simply chooses to adopt the reasoning in the Ninth Circuit opinion related to this Petitioner's case, United States v. Heim, 15 F.3d 830, 832 (9th Cir. 1994). Like Heim, the Allen opinion asserts that:

> Although the current background commentary to [Guideline] Section 4B1.1 identifies Section 994(h) as the source of the mandate . . . it is clear that the Commission could rely on the broader language of Section 994(a) . . . to include conspiracy related offenses in the career offender guideline.

Allen, supra, at 1994 WL 167838, page 6.

Counsel for Petitioner herein respectfully submits that the foregoing premise is not "clear" at all, inasmuch as Section 994(a) simply purports to empower the Sentencing Commission to draft guidelines, not to expand upon the specific congressional enactment which defines categories of career offenders. The validity of this construction of Section 994(a) is a central issue encompassed within the split of authority underlying the instant petition.

As its second ground to urge denial of certiorari herein, the United States contends that the jurisdictional defect noted in Price is "fully remediable by the Commission itself." (B.I.O., pages 10-11.) It is noted that on December 21, 1993, the Commission issued for comment a proposed amendment to the Commentary for

Guideline Section 4B1.1, wherein the Commission simply asserts that, in accord with the "general guideline promulgation authority under 28 U.S.C. Section 994(a)-(f), the Commission proposes to 'modify' the congressional definition of career offender contained in Section 994(h)." (B.I.O., page 11.) The United States candidly notes that this proposed amendment was not in fact transmitted to Congress (B.I.O., page 11, fn. 7), and it is not asserted that the proposed amendment has been, or presently is intended to be, incorporated into the guidelines. In essence, it appears to be the position of the United States that the publication of the above-referenced guideline amendment, for comment only, renders the split of authority noted herein moot for purposes of a grant of certiorari. Reference is

made to the case of Braxton v. United States, 500 U.S. 344 (1991), in support of that proposition. In Braxton, the issue of law which had generated a split of authority was whether stipulations of fact which establish a more serious offense than that pled to must be expressly incorporated into a formal plea agreement. While Braxton was pending, the Commission published a request for public comment on whether the guideline should be amended to require such express stipulations. The Court declined to treat the issue in Braxton ". . . because the Commission has already undertaken a proceeding that will eliminate circuit conflict. . . ." Braxton, supra, at 348.

Counsel for Petitioner herein respectfully submits that there are two fundamental problems with reliance upon

Braxton. First, the mere fact that the Commission has solicited public comment on a proposed guideline amendment does not necessarily imply that the amendment will be enacted at all, nor that the split of authority addressed in the inchoate amendment will in fact be eliminated thereby. Second, as has been suggested above, counsel for Petitioner does not accept the assumption that the proposed amendment in this case (i.e., an express assertion that the Commission now relies upon the general rule-making authority of Section 994(a)) will in fact resolve the question raised herein, to wit, whether any provision of Section 994 empowers the Commission to "modify" or "alter" an express congressional definition of career offender.

Finally, it should be noted that the

Petition herein raises a further issue regarding the degree of deference, and the parameters of deference, to be accorded Sentencing Commission enactments by construing courts. (Petition, at 21-22.) The sole response of the Government to this contention is citation to Stinson v. United States, 113 S. Ct. 1913, 1914 (1993), wherein the Court held that guideline commentary is authoritative unless ". . . it violates the Constitution or a federal statute. . . ." (B.I.O., page 12, fn. 8.) It is Petitioner's contention that the subject commentary is directly violative of express congressional language in Section 994(h)(1)(B), by presuming to modify and expand the express statutory definition of career offender.

B. **The Adequacy of Counsel/Continuance Issues**

The Brief in Opposition herein asserts that the Petitioner's claim of prosecutorial misconduct in opposing reasonable trial continuances, and the validation of inadequate trial preparation time on the ground that appointed counsel had "volunteered" to take this case, likewise merit no scrutiny by the Court. In support of this claim, the United States merely repeats the findings of the Court of Appeals. (B.I.O., pages 12-13.) Petitioner's counsel will not burden the Court with a restatement of previous arguments, but would simply emphasize that prosecutorial misleading of the trial court on the issue of continuance, and the "volunteer" theory to deprive

counsel of adequate time to prepare, are matters so centrally important to the fair administration of justice that they should be directly addressed and repudiated.

II.

CONCLUSION

By virtue of the foregoing considerations, counsel for Petitioner respectfully prays the Court for issuance of a writ of certiorari in the instant case.

Date: 7-8-94 Respectfully submitted

NICHOLAS DePENTO
Attorney for Petitioner

1:\PRODUCT\BRITENBA.RWC

Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

(H)

No. 93-1679

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL MEMORANDUM RE PETITION FOR WRIT OF CERTIORARI

NICHOLAS DePENTO
Attorney at Law
444 West C Street
Suite 120
San Diego, CA 92101
(619) 236-1151

Attorney for Petitioner

1pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	1

TABLE OF AUTHORITIES

Page

Cases:

United States v. Bellazarius,
24 F.3d 698 (5th Cir. 1994) . 2, 3

United States v. Mendoza-Figueroa,
(1994 WL 299912) 3

United States v. Price,
990 F.2d 1367 (D.C. Cir. 1993) 2, 3

Statutes:

28 U.S.C. Section 944(a) 3

28 U.S.C. Section 944(h) 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-1679

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

After the filing of briefs herein regarding the issuance of a writ of certiorari, counsel for petitioner was apprised of the existence of a new case,

United States v. Bellazarius, 24 F.3d 698 (5th Cir. 1994), issued on June 17, 1994, which directly bears upon the question. Pursuant to instructions of the Clerk of the Court, counsel offers the instant Supplemental Memorandum as the vehicle for advising the Court of this opinion.

Bellazarius is significant for two reasons. First, Bellazarius adopts the holding in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993), that a conspiracy offense may not be utilized as a trigger for the career offender guideline, at least insofar as the Sentencing Commission purports to rely upon 28 U.S.C. Section 944(h) as the authority for including conspiracy offenses. Bellazarius, supra, at 701. Secondly, Bellazarius directly addresses one of the arguments raised by respondent, to wit,

that a proposed amendment to the guidelines, shifting authority for inclusion of inchoate offenses to 28 U.S.C. Section 944(a), renders it unnecessary for the Court to address the problem. Bellazarius holds that the proposed amendment is prospective only, and does not validate sentences which were imposed under the prior erroneous guideline authority. Bellazarius, supra, at 702.

Counsel has further been advised that in a June 27, 1994, decision by the Eighth Circuit, United States v. Mendoza-Figueroa, (1994 WL 299912), that court likewise adopted the position of Price, supra, holding that a conspiracy offense does not lawfully trigger the career offender guideline.

Counsel for petitioner respectfully submits that the Bellazarius and Mendoza-

Figueroa opinions are analyses appropriate and relevant to the decision of the Court as to the issuance of a writ of certiorari.

Date: 8-10-94 Respectfully submitted

NICHOLAS DePENTO
Attorney for Petitioner